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NO. 91-1323

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CALVIN BURNEY

and

MITCHELL BURNEY,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To The Eighth District Court of Appeals For Cuyahoga County, Ohio

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The argument of counsel opposite

that "Petitioners make no allegation that they were denied a speedy trial as mandated by the U.S. Constitution..." (**Brief In Opposition**, **p. 9**) makes no sense at all. For it could not be clearer that R.C. of Ohio, §§2945.71-73, were expressly designed to insure compliance with the U.S. Constitutional requirement of a speedy trial (Sixth Amendment, United States Constitution). Indeed, the Ohio Supreme Court expressly concluded that such was the purpose of this legislation. The fact that this is so was even recognized by counsel opposite in his **Brief In Opposition**. The reference here is to counsel crediting the Ohio Supreme Court with having determined that the statutes referred to above "represent a

rational effort to enforce the constitutional guarantee of a speedy trial". In support of this thesis counsel correctly cited "**State v. Packay, 64 Ohio St. 2d 218 (1980).**" (**Brief In Opposition, p. 10.**)

The inescapable conclusion here could only be that these statutes, which (as shown above) were specifically crafted to insure that the constitutional requirement of a speedy trial is adhered to, were seriously violated. To the extent this is so, the rights sought to be protected by these very precise statutes were violated.

Indeed, the fact that our Court of Appeals addressed the issue before it in the context of the petitioners' right to a speedy trial could not be

made any clearer than it was in another quote from the State's **Brief In Opposition**. Here counsel actually credited the Court of Appeals with having addressed the "speedy trial issue" on its merits (id., p. 9).

Here it could not be any clearer that the speedy-trial issue, which was at the heart of the Opinions below, was specifically cast in terms of whether the constitutional right to a speedy trial was waived as to charges not specifically included in the written waiver. See **Appendix to Petition For Writ Of Certiorari**, Appendix "B", pp. A 9 - A 17 and Appendix "D", pp. A 36 - A 45. This being so, even a Hornbook lawyer would know that the right to a speedy trial relates to the right given in, and

protected by, the Sixth Amendment to the United States Constitution.

II

Equally indefensible is the argument by counsel opposite (**Brief In Opposition**, p. 11) that our complaint over the failure of the Court to instruct the jury on a statutory-affirmative defense was not a constitutional issue. In making that argument counsel seems clearly to have ignored the most critical aspect of the contention being made.

Simply put, our position is that the failure of the Court to submit the affirmative defense issue to the jury translates into a finding by the jury that the defense was not made.

We cited in support of this thesis cases which take the position

that it is the duty of the trial court to instruct the jury, as an aspect of due process, on all the issues involved in the case. See **Green v. United States, 405 F.2d 1368, 1370 (D.C. Cir. 1968)** and **United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971)**. Since this was not done here, it follows that the court's failure to instruct the jury on the affirmative defense put forth by one of the petitioners must be regarded as a due process violation.

On the other hand, the argument made by counsel opposite that because the Ohio Courts (i.e., both the trial court and the Court of Appeals) decided the issues herein against the petitioners it must be correct, truly misses its mark. This follows because

there is nothing about the way the courts addressed the issue here involved that shows the court engaged in a studied analysis of the arguments made by the petitioners.

III

In the State's challenge against our sufficiency argument (Argument No. IV) counsel opposite again attempts to gospelize conclusory findings made by the Court of Appeals. The problem with the State's argument, as written (**Brief In Opposition**, p. 12), is that *it fails to evidence even a slight awareness, by the writer, that it is not enough to simply say the evidence was sufficient to carry the day. Surely some effort should have been made to show why this is so.*

So postured, if nothing else, the

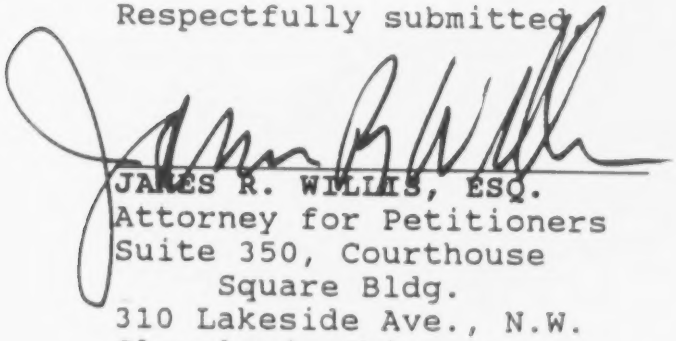
requirements of due process are such that specific proof of a specific crime is still essential. And, regardless of the penchant of a state reviewing court for burying sufficiency challenges under dated cliches that centralize this Court's critical holding in Jackson v. Virginia, 443 U.S. 307 (1979), the constitutional requirement is simply not satisfied by conclusory references to controlling tenets.

CONCLUSION

For all of the reasons argued on behalf of these petitioners certiorari should be granted. And, this to the

end that their causes can be meaningfully reviewed.

Respectfully submitted,



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